

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

TROY DAVID	:	CIVIL ACTION
	:	
v.	:	
	:	
JAMES S. PRICE, et al.	:	NO. 97-7643

M E M O R A N D U M

Padova, J.

July 9, 1998

Petitioner, Troy David, a state prisoner at the State Correctional Institute at Pittsburgh, Pennsylvania, filed a pro se Petition for a Writ of Habeas Corpus ("Petition") pursuant to 28 U.S.C.A. § 2254 (West 1994). In accordance with 28 U.S.C.A. § 636(b)(1)(B)(West 1993) and Local Rule of Civil Procedure 72.1, this Court referred the Petition to United States Magistrate Judge Arnold C. Rapoport for a Report and Recommendation. Magistrate Judge Rapoport recommended that the Court dismiss the Petition, and Petitioner filed objections. For the following reasons, I will overrule Petitioner's objections, approve and adopt Magistrate Judge Rapoport's Report and Recommendation, as supplemented herein, and deny and dismiss the Petition.

I. FACTS

The factual findings and procedural history relevant to the Court's analysis of Petitioner's objections are set forth in Magistrate Judge Rapoport's Report and Recommendation. Petitioner does not object to Magistrate Judge Rapoport's

rendition of these facts. Therefore, for purposes of this de novo review, the Court incorporates by reference the factual findings and procedural history set forth in the Report and Recommendation.

II. LEGAL STANDARD

"[I]n conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States." Kontakis v. Beyer, 19 F.3d 110, 114 (3d Cir. 1994)(citation omitted). Where a habeas petition has been referred to a magistrate judge for a report and recommendation, the district court "shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. . . . [The Court] may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate." 28 U.S.C.A. § 636(b).¹

III. DISCUSSION

In his Petition, Petitioner sought federal habeas relief on the following three grounds:

¹It is difficult to determine whether Petitioner objects to the entire Report and Recommendation or only to portions of it. Because of this uncertainty, the Court will make a de novo determination of the entire Report and Recommendation.

1. The Court of Common Pleas and Superior Court of Pennsylvania violated petitioner's constitutional rights to seek redress via Post-Conviction Relief Act Petition ("PCRA"), 42 Pa.C.S.A. § 9541, et seq., by ruling petitioner's claims for relief as being waived due to repetitive or serial petition;

2. The State Court corrective process usurped and ignored petitioner's claims, thus access to the State Courts was frustrated and consequently inadequate;

3. Petitioner was not afforded a fair opportunity to seek relief in state court of his conviction because he was unable, proceeding pro se, to comply with the state rule by himself, and the state would not appoint a lawyer, thus, petitioner is excused from compliance with the exhaustion requirement in seeking federal habeas relief.

(Mem. Supp. Pet. at 1-2.) The first and second grounds for relief clearly concern purported errors of state law that occurred in connection with Petitioner's state post-conviction PCRA proceedings. As Magistrate Judge Rapoport correctly ruled, federal habeas relief does not lie for errors of state law. Estelle v. McGuire, 502 U.S. 62, 67, 112 S. Ct. 475, 479 (1991). Federal habeas review is limited to deciding whether a state conviction violated the Constitution or laws of the United States. Id. Because Petitioner's first and second claims do not concern violations of federal constitutional or statutory law, they are not cognizable under 28 U.S.C. § 2254.

Magistrate Judge Rapoport interpreted Petitioner's third claim as alleging an error of state law based on the state court's failure to appoint counsel to represent Petitioner in his second and third PCRA actions. (Report at 4.) Interpreted as

such, Magistrate Judge Rapoport properly denied this claim on the basis that federal habeas relief does not lie for errors of state law. (Id. at 4-5.)

There is another possible interpretation, however, of this claim. Petitioner may be claiming ineffective assistance of PCRA counsel for failing to advise Petitioner that, by withdrawing the first PCRA petition, Petitioner's constitutional claim of ineffective assistance of trial counsel would be subject to default pursuant to state procedural rules.² In this regard, Petitioner states in his Petition "that [his] withdrawal of PCRA was not done with full knowledge that it would be used against [him] as a bar to any future PCRA submissions," and that his PCRA counsel was ineffective because counsel failed "to assist in [the first PCRA] proceeding, left defendant with no choice but to withdraw same, not knowing that he needed the Court to say it was dismissed without prejudice so a more fully developed PCRA could be submitted." (Pet. at 4.) As a result, Petitioner's ineffective assistance of trial counsel claim, which was raised in his PCRA proceedings, was procedurally defaulted. (Mem. Supp. Pet. at 2-4, 9-10; Pet.'s Obj. at 2-3, 5-8.)

²Pro se habeas petitions should be liberally construed. United States ex rel. Montgomery v. Brierley, 414 F.2d 552, 555 (3d Cir. 1969). Therefore, as part of this de novo review, the Court will also consider Petitioner's third claim as advancing the contention that the ineffective assistance of his PCRA counsel resulted in the procedural default of Petitioner's ineffective assistance of trial counsel claim.

Even with this alternate interpretation of the third claim, federal habeas review is still barred. Although neither the Supreme Court nor the Third Circuit has addressed the question whether errors or deficiencies in state post-conviction proceedings can be raised in federal habeas proceedings, the majority of Circuits have held that such deficiencies are not reviewable in federal habeas proceedings. Franzen v. Brinkman, 877 F.2d 26, 26 (9th Cir. 1989); Hopkinson v. Shillinger, 866 F.2d 1185, 1218-19 (10th Cir. 1989); Bryant v. Maryland, 848 F.2d 492, 493 (4th Cir. 1988); Millard v. Lynaugh, 810 F.2d 1403, 1410 (5th Cir. 1987); Spradley v. Dugger, 825 F.2d 1566, 1568 (11th Cir. 1987); Kirby v. Dutton, 794 F.2d 245, 247-48 (6th Cir. 1986); Mitchell v. Wyrick, 727 F.2d 773, 774 (8th Cir. 1984). See also Brockenbrough v. Snyder, 890 F. Supp. 342, 344 (D. Del. 1995). But see Dickerson v. Walsh, 750 F.2d 150, 153 (1st Cir. 1984). These courts have concluded that the federal habeas writ "is not the proper means by which prisoners should challenge errors or deficiencies in state post-conviction proceedings . . . because the claims address collateral matters and not the underlying state conviction giving rise to the prisoner's incarceration." Kirby, 794 F.2d at 247.

In this case, it is not necessary for the Court to decide whether a claim of infringement of a federal constitutional right in a state post-conviction proceeding is ever cognizable in a

habeas proceeding. As the Court of Appeals for the Seventh Circuit explained, "[u]nless state collateral review violates some independent constitutional right, . . . errors in state collateral review cannot form the basis for federal habeas corpus relief." Montgomery v. Meloy, 90 F.3d 1200, 1206 (7th Cir. 1996); see also Proudfoot v. Vaughn, Civ.A.No. 94-590, 1997 WL 381590, at *5 (E.D. Pa. July 2, 1997). Petitioner's claim of ineffective assistance of PCRA counsel does not implicate an independent constitutional right because there is no constitutional right to counsel in state post-conviction proceedings. Pennsylvania v. Finley, 481 U.S. 551, 555-57, 107 S. Ct. 1990, 1993-94 (1987). Consequently, there is no Sixth Amendment right to effective assistance of counsel in state post-conviction proceedings. Tillett v. Freeman, 868 F.2d 106, 108 (3d Cir. 1989). Petitioner's claim is not one arising under the Constitution or laws of the United States. Id. Therefore, Petitioner's ineffective assistance of PCRA counsel claim is not cognizable under Section 2254.³

For the foregoing reasons, the Court will adopt and approve the Report and Recommendation, as supplemented herein, will deny

³Because of this finding, the Court does not need to reach Petitioner's argument that he can overcome the procedural default of his ineffective assistance of trial counsel claim under the cause and prejudice or the miscarriage of justice tests. See Coleman v. Thompson, 501 U.S. 722, 111 S. Ct. 2546 (1991).

and dismiss the Petition, and will find that there is no probable cause for appeal. An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

TROY DAVID	:	CIVIL ACTION
	:	
	:	
v.	:	
	:	
	:	
JAMES S. PRICE, et al.	:	NO. 97-7643

O R D E R

AND NOW, this 9th day of July, 1998, upon consideration of Petitioner's Exceptions/Objections to Magistrate Judge's Report & Recommendation (Doc. No. 11) and the Response thereto (Doc. No. 12), **IT IS HEREBY ORDERED** that

1. The Report and Recommendation is APPROVED and ADOPTED, as supplemented in the accompanying Memorandum;
2. The Petition for Writ of Habeas Corpus is DENIED and DISMISSED; and
3. There is no probable cause for appeal.

BY THE COURT:

John R. Padova, J.